

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EVER.AG, LLC,

Plaintiff,

v.

MILK MOOVEMENT, INC., a/k/a Milk
Moovement, LLC, a foreign corporation,

Defendant.

No. 2:21-cv-02233 WBS AC

ORDER and STANDING ORDER TO SHOW
CAUSE

A hearing was specially set to accommodate an “Ex Parte Application for Emergency OSC” brought by defendant Milk Moovement. ECF No. 387. The motion was subsequently ordered submitted on the papers. ECF No. 412. For the following reasons the motion is DENIED and Milk Moovement shall reimburse plaintiff for the fees and costs associated with litigation of the motion. Further, as explained further below, the parties are cautioned that the court will hereafter consider the issuance of monetary sanctions, payable to the court, against the losing party in any future orders on discovery related motions.

I. Ruling on Emergency Ex Parte Motion

On August 7, 2023, Milk Moovement brought an emergency motion “to seek relief from the Court to remedy an ongoing campaign orchestrated by Dairy and its counsel to directly contact, intimidate, and harass Milk Moovement investors, potential investors, board members, current customers, and potential customers regarding this litigation.” ECF No. 387 at 3. Milk

1 Moovement asked the court to issue an Order to Show Cause to Ever.Ag, LLC (“Dairy”) which
2 would “require that Dairy provide adequate prior written notice before engaging in further
3 communications with Milk Moovement’s employees, board members, investors, and/or current or
4 potential customers about this litigation.” Id. The court notes that Milk’s “emergency” ex parte
5 motion did not adequately address “why the regular noticed motion procedures must be
6 bypassed.” Mission Power Eng’g Co. v. Cont’l. Cas. Co., 883 F. Supp. 488, 492 (C.D. Cal.
7 1995). The parties are cautioned that future “emergency motions” that ultimately amount to a
8 discovery dispute will be re-designated and a joint statement will be required. With respect to
9 this motion, the motion was not heard on an ex parte basis, so the undersigned turns to the merits.

10 Milk does not identify any specific basis in the Federal Rules of Civil Procedure or within
11 applicable caselaw for its motion; instead, the motion ask the court to invoke its “inherent
12 authority to enter remedial orders ‘when a party has acted in bad faith, vexatiously, wantonly, or
13 for oppressive reasons, delaying or disrupting litigation, or has taken actions in the litigation for
14 an improper purpose.’” ECF No. 387 at 8 (quoting Fink v. Gomez, 239 F.3d 989, 992 (9th Cir.
15 2001)). Milk contends that Dairy board member Stephen Davis, who is also a controlling
16 investor in Dairy’s parent company Banneker Partners, has been taking a “more direct” role in
17 this litigation since May 2023 by directly contacting individuals associated with Milk, including
18 Milk’s minority investor Sean Broderick and Milk board member Carle Stenmark. ECF No. 387
19 at 4. At first these discussions “proceeded with the guidance of each party’s counsel” but,
20 according to Milk, “it soon became apparent that Mr. Davis was less interested in constructive
21 discussions and more interested in threatening Milk Moovement and its investors.” Id. Mr.
22 Davis was asked to refrain from communicating directly with Milk investors and board members.
23 Id. However, Davis emailed Stenmark and a colleague of Broderick’s again in early July. Id.
24 Milk contends this is impermissible and in violation of the California Bar Association’s Rules of
25 Professional Conduct (which, Milk suggests, applies to Mr. Davis because at one time he was an
26 attorney licensed in the state of New York, though he no longer has an active license and is not a
27 practicing attorney.). ECF No. 387 at 4, 9.

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1 Following Mr. Davis’s communications, on or around July 13, 2023, Dairy issued 19
2 subpoenas to third-party Milk Moovement investors and potential investors, only one of whom
3 was listed on any party’s Rule 26 disclosures, and the subpoenas were served over the weekend
4 and in some cases, during evening hours. ECF No. 387 at 6. These “subpoenas forced Milk
5 Moovement and its counsel to field an array of anxious calls from investors who were
6 understandably taken aback by receiving such overbroad and aggressively served discovery
7 demands.” Id. at 6. These subpoenas are the topic of a pending motion for a protective order.
8 Id.; ECF No. 380. Milk further alleges that it learned that Dairy’s sales executives were
9 conducting pretextual “courtesy calls” to current and potential Milk customers to discuss issues in
10 the litigation and disparage Milk Moovement. ECF No. 387 at 7. Finally, on August 2, 2023,
11 Mr. Davis resumed his email campaign and contacted Milk’s investors, this time making “tacit
12 threats.” Id. at 7-8.

13 Now, Milk asks the court to “enter a modest order to show cause (1) requiring Dairy’s
14 counsel to provide Milk Moovement’s counsel with two business days’ written notice before
15 Dairy, its counsel, or persons acting on their behalf contact any Milk Moovement Parties
16 regarding this litigation; (2) requiring Dairy’s counsel to provide Milk Moovement’s counsel with
17 two business days’ written notice before serving any subpoena under Rule 45 on any other Milk
18 Moovement Parties, with notice to contain the proposed subpoena and a request whether Milk
19 Moovement’s counsel will accept service on behalf of such party; (3) requiring Dairy’s counsel to
20 provide an explanation stating whether any Dairy counsel reviewed, provided guidance for,
21 and/or had advanced notice of Mr. Davis’s communications with the Milk Moovement Parties
22 regarding this litigation on or after Milk Moovement’s notices to cease those communications;
23 and (4) setting a briefing schedule concerning Milk Moovement’s request for monetary and other
24 sanctions, including admonishment, and any other relief the Court deems proper, pursuant to the
25 Court’s inherent authority.” Id. at 10-11.

26 The court has reviewed the documents attached by Milk and finds no cause to invoke its
27 inherent authority to issue the “modest” order suggested. There is no clear evidence of egregious
28 or even untoward behavior. For example, Milk attaches an email chain in which Milk’s counsel

1 writes to Dairy's counsel accusing them of "attempting, without notice, to further harass Milk
2 Movement's board members at home late last week and over the weekend with some form of
3 subpoena." ECF No. 387-10 at 3. Milk's counsel goes on to write, "Please provide copies of the
4 subpoenas and we will coordinate acceptance of service. In meantime, be advised that those are
5 represented parties. Please do not attempt to communicate with them directly about this case
6 without our prior express written consent - something we already have advised you of in writing.
7 We trust further attempts to stake out folks' homes over the weekend, etc, will cease. If not, I am
8 sure we can address with Judge Claire and seek appropriate relief." ECF No. 387-10 at 3.
9 Counsel for Dairy replied, "Thanks for your message, Noah. We asked our process servers to
10 serve the subpoenas, but were not asking them to show up at particular times, so if they showed
11 up at night that was not due to any instruction of ours. Note that your team was served with
12 notices of all of the subpoenas before we started serving people using process servers. No one
13 told us they would accept service. . . . Obviously, if you are accepting service, we can save
14 everyone time, money, and annoyance by simply emailing all the subpoenas to you. Let us
15 know." Id. Despite this perfectly reasonable response from Dairy's counsel, Milk included
16 allegations in the "emergency" motion that Dairy is serving subpoenas in a manner intended to
17 intentionally harass recipients. The accusation is negated by the available documents.

18 Further, Milk's attempt to apply the California Bar Association's Rules of Professional
19 Conduct to Mr. Davis is perplexing, given that Milk acknowledges that Mr. Davis is not acting as
20 an attorney in this case and is, in fact, no longer a licensed attorney in any jurisdiction. Even if
21 Mr. Davis were a licensed and/or practicing attorney, which he is not, Milk does not attempt to
22 argue that Mr. Davis is acting as counsel in this case. The applicable California Rule of
23 Professional Conduct, Rule 4.2, states clearly in Comment 3 it "does not prevent represented
24 persons from communicating directly with one another with respect to the subject of the
25 representation, nor does it prohibit a lawyer from advising a client concerning such a
26 communication. A lawyer may also advise a client not to accept or engage in such
27 communications." It has always been clear that the Rule is "not intended to prevent the parties
28 themselves from communicating with respect to the subject matter of the representation." HTC

1 Corp. v. Tech. Properties Ltd., 715 F. Supp. 2d 968, 973 (N.D. Cal. 2010). There is nothing
 2 about Mr. Davis’s communications that rises to the level of harassment or intimidation, and the
 3 court finds no legal basis to warrant sanctions.

4 Finally, to the extent Milk argues that Dairy should not be able to contact its clients,
 5 potential clients, investors, or potential investors because Dairy is engaging in abusive practices,
 6 nothing in Milk’s exhibits clearly demonstrates misbehavior. Milk argues that “[t]hreatening or
 7 attempting to influence or intimidate witnesses in order to affect their testimony amounts to
 8 unlawful tampering,” but there is no evidence that Dairy or any of its employees or
 9 representatives has threatened or intimidated anyone. The most allegedly harassing quotes from
 10 Mr. Davis’s emails amount to Mr. Davis saying that Milk and its counsel’s behavior will
 11 ultimately cause embarrassment.¹ The tenor of these communications reflects the unfortunate
 12 tenor that has characterized this case from the outset, but that does not make the Davis
 13 communications abusive or intimidating. The motion will be denied.

14 II. Fees and Costs

15 The ex parte motion, brought before the court to be heard on an emergency basis, is
 16 without a basis in law or fact. Milk is accordingly required to reimburse Dairy for fees and costs
 17 associated with the litigation of this meritless motion.

18 III. Notice of Affidavit Requirement and Consideration of Future Sanctions

19 The parties in this case have consistently engaged in obstructive and overly litigious
 20 discovery practices. This case, which is not inherently complex from a discovery perspective, has
 21 been pending for just over twenty-one months and has presented this court with a breathtaking
 22 twenty-seven (27) discovery related motions in that time. ECF Nos. 34, 66, 86, 93, 96, 117, 139,
 23 141, 151, 152, 185, 189, 206, 242, 246, 260, 264, 268, 269, 272, 301, 302, 351, 352, 380
 24 (pending), 387 (motion at bar), 405 (pending). This number *does not include* the absolute glut of
 25 associated motions for administrative relief and requests to seal documents. The amount of

26 ¹ E.g., “As significant shareholders and/or board members, you are intimately involved and if
 27 you don’t take control of this matter you will be tainted by MM’s and its counsel’s actions”;
 28 “Your counsel has basic facts wrong Shawn and it’ll be embarrassing for him, MM and its
 board.” ECF No. 387-11 at 2.

1 discovery related litigation in this case is absurd and bespeaks a fundamental breakdown of civil
2 practice between the parties, a questionable willingness to drive up litigation costs, and an
3 unacceptable overuse of the public resource that is the federal court system.

4 “Three primary sources of authority enable courts to sanction parties or their lawyers for
5 improper conduct: (1) Federal Rule of Civil Procedure 11, which applies to signed writings filed
6 with the court, (2) 28 U.S.C. § 1927, which is aimed at penalizing conduct that unreasonably and
7 vexatiously multiplies the proceedings, and (3) the court’s inherent power.” Fink v. Gomez, 239
8 F.3d 989, 991 (9th Cir. 2001). Under its inherent authority the court may issue “sanctions for bad
9 faith, which includes a broad range of willful improper conduct.” Id. at 992. Sanctions are
10 permissible wherever a party has acted bad faith, or where there has been recklessness plus
11 “something more – such as an improper purpose.” “A finding of bad faith is warranted where an
12 attorney ‘knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for
13 the purpose of harassing an opponent.’” Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644,
14 649 (9th Cir. 1997)

15 Considering the pattern of vexatious discovery conduct in this case, the parties are hereby
16 notified that the undersigned will review every forthcoming discovery motion for sanctionable
17 conduct. Furthermore, it is ORDERED that this order shall operate as a STANDING ORDER
18 TO SHOW CAUSE requiring each future discovery motion to be accompanied by an affidavit
19 from counsel on each side, explaining why if their client loses the motion the court should not
20 issue monetary sanctions in the amount of \$10,000.00, payable to the court and in addition to fees
21 and costs payable to the prevailing party. The parties are strongly encouraged to work
22 cooperatively to resolve discovery disputes and, most importantly, to avoid discovery disputes by
23 adhering to their own discovery obligations.

24 IV. Conclusion

25 Based on the foregoing, the court orders as follows:

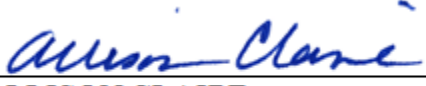
- 26 1. The emergency ex parte motion filed at ECF No. 387 is DENIED;
- 27 2. Milk Moovement shall reimburse Dairy the fees and costs associated with the litigation of
28 this motion. The parties are encouraged to file a stipulation as to the specific amount no

1 later than August 28, 2023. If the parties are unable to reach an agreement, Dairy may file
2 a motion on August 28, 2023 and Milk may file an opposition no later than August 30,
3 2023;

- 4 3. The court hereby issues a STANDING ORDER TO SHOW CAUSE, as follows: Each
5 future discovery motion shall be accompanied by an affidavit from counsel on each side,
6 showing cause why, if their client loses the motion, the court should not issue monetary
7 sanctions in the amount of \$10,000.00, payable to the court and in addition to fees and
8 costs payable to the prevailing party, for improper discovery conduct and unreasonable
9 multiplication of the proceedings. These affidavits shall be limited to 5 pages, and must
10 be free of attachments and exhibits. They shall be filed independently of the joint
11 statement and are due on the same date as the joint statement.
- 12 4. The pending discovery motions at ECF No. 380 and ECF No. 405 are hereby RE-SET for
13 hearing on the papers, with Joint Statements due on September 13, 2023. The parties
14 should consider whether these motions should be withdrawn or narrowed in light of the
15 foregoing.

16 IT IS SO ORDERED.

17 DATED: August 18, 2023

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19 ALLISON CLAIRE
20 UNITED STATES MAGISTRATE JUDGE
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